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SUPREME COURT

No. 07-1193

In The
Supreme Court of the United States

KRISTEN DAY, ET AL.,

Petitioners,

v.

RICHARD BOND, ET AL.,

Respondents,

KANSAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET. AL.,

Respondent-Intervenors.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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REPLIES TO LEGAL AND FACTUAL MISSTATEMENTS BY RESPONDENTS

Respondents' Brief in Opposition significantly obfuscates the issues in this case. The following analysis corrects Respondents' misstatements in five areas.

In contrast, the Brief in Opposition submitted by Respondent-Intervenors fairly describes the issues raised in this case. Indeed, Respondent-Intervenors suggest that if the writ is granted, *a third question* could also be reviewed by this court. Resp.-Interv. Br. i.[1] In Section III, below, the possibility of a third question is discussed.

I. The Tenth Circuit Expressly Made Standing Dependent upon the Existence of a Private Right of Action

As explained at length in the Cert. Petition, the Court below unequivocally and repeatedly made the existence of standing dependent upon the existence of a private right of action under 8 U.S.C. § 1623. In their Brief, Respondents grasp at straws to suggest that the Court did otherwise. They declare that the Court "simply determined whether Petitioner's single chosen injury was an 'injury in fact.'" Resp. Br. 10. Of

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[1] Petitioners do not object to dividing the Equal Protection standing issue into two separate questions, as Respondent-Intervenors suggest. However, if this Court wishes to further isolate the legal issues, a more appropriate third question is presented in Section III, below.

course that was the task before the Court. But Respondents cannot plausibly deny that the Circuit Court made the existence of an injury-in-fact dependent upon the existence of a private right of action. The Court reiterated multiple times exactly what it was doing.

In the words of the Circuit Court, "The standing question *is* whether § 1623 creates a private right of action." *Day v. Bond*, 500 F.3d 1127, 1138 (10th Cir. 2007) (emphasis added). The Court posed the question, "[w]hether we are required to accept the Plaintiffs' assertion of a private, enforceable right under § 1623 for purposes of our review of standing." *Id.* at 1136. "We affirmed the district court's dismissal of the preemption claim after concluding that Plaintiffs lacked standing *because* § 1623 did not confer a private right of action." *Day v. Bond II*, 511 F.3d 1030, 1032 (2007)(emphasis added). The Court repeatedly described its holding as "our decision requiring a private right of action to establish standing for their preemption claim..." *Id.* at 1034.

In spite of these numerous declarations by the Court itself, Respondents disingenuously suggest that the Court actually kept the doctrines of standing and private right of action separate. In support of this claim, Respondents take out of context a quote in which the Court described as inapplicable *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004). Resp. Br. 10-11. In *Qwest*, the Tenth Circuit held that a private right of action is not necessary to bring a preemption challenge. The panel below stated that *Qwest* was not dispositive, "because there this court did not determine that a plaintiff may bring a

preemption claim without *standing*." *Id.* (*quoting Day II*, 511 F.3d at 1033). In other words, the Court agreed with Petitioners that a private right of action is not normally necessary to bring a preemption claim. But the Court determined that where the injury-in-fact is an injury to a legal interest created by the preemptive statute, then the Court would recognize an injury-in-fact *only if* the statute included a private right of action. The Court was not keeping the two doctrines separate, as Respondents misleadingly suggest. On the contrary, the Court was explaining why it felt compelled to "requir[e] a private right of action to establish standing...." *Id.* at 1034.[2]

In contrast to Respondents, Respondent-Intervenors are more forthright in describing the Circuit Court's holding. They acknowledge that the Court made the existence of standing dependent upon the existence of a private right of action. Resp.-Interv. Br. 15. However, they argue that such a jurisprudential maneuver was necessary. "[W]here no separate injury was asserted nor evident, the court was compelled to look to private right of action law to

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[2] If this Court were to grant the writ and later reverse the holding of the Court below regarding Petitioners' standing to bring their preemption claim under 8 U.S.C. § 1623, the District Court would be able to address the merits of the preemption claim, regardless of whether the statute created a private right of action. The *Qwest* holding remains good law in the Tenth Circuit, and the panel below reiterated its support for the principle that "a federal law need not include a private right of action in order to support federal question jurisdiction when a party pursues a preemption claim arising under the Supremacy Clause." *Bond II*, 511 F.3d at 1034.

assist it to determine if there was 'an invasion of a judicially cognizable interest'...." *Id.* That may or may not be true; that assertion will presumably be addressed if this Court grants the writ.

II. Other Circuits Reject the Tenth Circuit's Merging of Standing and Private Right of Action Doctrines

Unable to rewrite the Circuit Court's opinion so that it does not erroneously merge standing and private right of action doctrines, Respondents fall back to an alternative response: the decisions of the other Circuits do not really conflict with the decision below.

Respondents' first attempt to obscure the conflict between Circuits is a weak one. They declare that because the decisions of the other Circuits did not involve preemption challenges based solely on statutory rights, they do not apply. Resp. Br. 12. That is, of course, a distinction without a difference. The principles of standing are the same, regardless of whether the merits of a case involve preemption or some other claim. Respondents' declaration is also incorrect with respect to the Ninth Circuit case of *Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk*, 91 F.3d 1240 (9th Cir. 1996), which *was* a preemption case. Tellingly, Respondents do not mention *Kirk*.

Respondents' second attempt to obscure the conflict is equally flawed. They claim that none of the other Circuits "discuss whether, when, or under what conditions one might borrow from cause of action jurisprudence to evaluate whether an injury exists...."

Resp. Br. 13. On the contrary, the other Circuits do discuss this question; but their answer is one that Respondents do not like: *never*. See *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 n.4 (9th Cir. 2002); *Louisiana Landmarks Society, Inc. v. City of New Orleans*, 85 F.3d 1119, 1122 n.3 (5th Cir. 1996); *Bowman v. Wilson*, 672 F.2d 1145, 1151 n.10 (3d. Cir. 1982). Respondents are dissatisfied with these decisions because they do not contain extended discussions of when it *might* be permissible to "borrow from cause of action jurisprudence" to assess standing. When the answer is never, no such extended discussion is necessary.

To be sure, these doctrines are complex. As the decision below illustrates, courts may confuse and blend them. Granting the writ would allow this Court to definitively clarify whether a court's view regarding the existence of a private right of action has any bearing on a plaintiff's standing.

III. Respondents-Intervenors Highlight an Important Subsidiary Question: Must a Court Accept for Standing Purposes a Plaintiff's Asserted Legal Interest Created by the Statute at Issue?

Respondent-Intervenors rightly recognize that there is another important question that is raised by Petitioners' 8 U.S.C. § 1623 challenge: *When the asserted injury-in-fact is based solely on a statutory claim, must an Article III Court "accept at face value" that a plaintiff has a legal interest under the statute?* Resp.-Interv. Br. 15. As Respondent-Intervenors explain, the Court below answered this question in the

negative, and then proceeded to use private right of action doctrine as a way of searching for an injury-in-fact. *Id.* If the legal issues in this case are to be isolated further, then this would be the most appropriate additional question.[3]

Respondent-Intervenors argue that the answer to the question is no—that a court assessing standing need not accept a plaintiff's interpretation of the statute creating the legal interest. *Id.* Petitioners disagree. In assessing standing, a Court must accept at face value a plaintiff's claim of injury to the statutory right asserted. "The actual or threatened injury required by Art. III may exist *solely* by virtue of 'statutes creating legal rights, the invasion of which creates standing....'" *Warth v. Seldin*, 422 U.S. 490, 500 (1975)(*quoting Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973))(emphasis added); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). If the plaintiff's interpretation of the statute is flawed, then that determination should be made later, during consideration of the merits. *Warth*, 422 U.S. at 500.

Other Circuits have taken varying approaches when confronted with injury-in-fact that rests solely on a legal interest created by statute. However, none are as restrictive as that of the Tenth Circuit. For example, the Fourth Circuit was presented with a similar case in which a plaintiff asserted injury-in-fact based solely upon the invasion of his legal interests

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[3] This question would only concern Petitioners' 8 U.S.C. § 1623 claim. Petitioners' Equal Protection injury-in-fact is entirely independent of the statute.

under the Information Quality Act, 44 U.S.C. § 3516. To assess the plaintiff's standing, the Court looked to the statute simply to determine whether it could be reasonably read to "create... legal rights in any third parties." *Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006). In contrast to 8 U.S.C. § 1623, the Information Quality Act did not mention third parties at all. Accordingly, the Court held that the plaintiff had not asserted injury to a judicially cognizable interest. The Fourth Circuit has also looked to the underlying purpose of the statute at issue to determine whether it creates a judicially cognizable interest for standing purposes. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. S.C. 2000)(finding interest in "fishable and swimmable" water created by Clean Water Act).

The Third Circuit has deferred to plaintiffs' assertions of legal interests created by statute, finding injury-in-fact to such interests even where the plaintiff did not ultimately satisfy the terms of the statute to prevail on the merits. A plaintiff "need not demonstrate actual harm in order to have standing." *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 456 (3d Cir. 2003)(assessing standing to seek disclosure of information under the Employee Retirement Income Security Act).

Likewise, the D.C. Circuit has deferred to plaintiffs' assertions of statutorily-created interests. For example, the Court held that the Smokeless Tobacco Health Education Act created a widely-held statutory interest in receiving information, sufficient to establish standing. *Public Citizen v. FTC*, 869 F.2d 1541, 1549 (D.C. Cir. 1989).

These widely varying approaches where injury-in-fact exists solely by virtue of a statute creating a legal interest illustrate the need for guidance from this Court. Addressing this additional question would allow this Court to clarify what, precisely, a court must determine to assess standing in such cases.

IV. Respondents' Narrow Reading of *Jacksonville* only Highlights the Existing Circuit Split

In attempting to throw a veil over the pronounced circuit split regarding the scope of *N.E. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993), Respondents make a preposterous claim. Respondents declare that standing under *Jacksonville* has only been recognized where plaintiffs are "able and ready"[4] to compete for a benefit after a discriminatory barrier is removed. Resp. Br. 23. According to Respondents, all Circuits are in accord with the Tenth Circuit—applying *Jacksonville* to recognize standing only where plaintiffs would otherwise qualify for the benefit if the discriminatory barrier were removed.

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[4] The phrase "able and ready" was used in *Jacksonville*, but it is clear from the context of the sentence that it referred only to cases challenging racial set-aside programs: "[A] party *challenging a set-aside program like Jacksonville's* need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so...." *Jacksonville*, 508 U.S. at 666 (emphasis added). Moreover, if the phrase "able and ready" was intended to apply in contexts outside of racial set-aside programs, Petitioners certainly would be "able and ready" to pay in-state tuition rates.

Respondents' attempt to obscure the circuit split collapses quickly under inspection. Contrary to Respondents' claim, the other Circuits have expressly applied *Jacksonville* to recognize standing even where other laws would still bar plaintiffs from obtaining the sought-after benefits. This is most clearly demonstrated in the Eighth Circuit case of *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006). In *Bruning*, the plaintiff public interest group challenged Nebraska's constitutional amendment limiting marriage to heterosexual unions. The Court expressly stated that if Nebraska's constitutional amendment were struck down, the gay and lesbian plaintiff group members *still would be unable to marry*, because under Nebraska statutes "marriage and domestic partnership licenses are not available to same-sex couples...." *Id.* at 863. Citing *Jacksonville*, the Court held that even though the plaintiffs still would be ineligible to receive marriage licenses, the removal of the discriminatory barrier itself would suffice to confer standing on them. *Id.* The similarity to the case at bar could not be more obvious. Petitioners would still be disqualified from receiving in-state tuition by a Kansas statute that predates K.S.A. § 76-731a[5] (unless Respondents were enjoined to reimburse Petitioners the extra tuition paid). But removal of the discriminatory barrier imposed by K.S.A. § 76-731a is still sufficient remedy to confer standing, under the Eighth Circuit's analysis.

Equally relevant in dispelling Respondents' illusion that all Circuits are in accord is the Ninth Circuit case

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[5] K.S.A. § 76-729.

of *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002). The *Silveira* plaintiffs challenged California's assault weapons ban on Equal Protection grounds because the law made exceptions for off-duty and retired police officers. If the allegedly-discriminatory exceptions were struck down, the plaintiffs still would not qualify. The Ninth Circuit applied the *Jacksonville* precedent and held that the plaintiffs possessed standing to bring their equal protection claim—*even though eliminating the exceptions would not result in the benefit being extended to the plaintiffs*. *Id.* at 1087. If the Tenth Circuit's reasoning had prevailed, then the plaintiffs would have lacked standing, because they were unable to demonstrate that they "could have obtained the benefit" once the discriminatory barrier was removed. Resp. Br. 23.

Respondents cannot credibly claim that these Circuits share the Tenth Circuit's cramped understanding of *Jacksonville*.

Granting the writ will allow this Court to provide much-needed clarification of the *Jacksonville* precedent. Such clarification will apply in numerous contexts, including challenges to programs that distribute benefits discriminatorily, challenges to state-level constitutional provisions where statutory provisions still exclude plaintiffs, and challenges to discriminatory exceptions in statutes.

V. K.S.A. § 76-731a Facially Excludes U.S. Citizens, and No U.S. Citizen has been Adjudicated to be Eligible Under its Terms

In an effort to restate the background of this case more sympathetically to their position, Respondents claim that K.S.A. § 76-731a might allow U.S. citizens to receive its benefits. Resp. Br. 3, 8. This is false. As the title of the statute clearly states: "*Certain persons without lawful immigration status* deemed residents for purpose of tuition and fees." K.S.A. § 76-731a (emphasis added). This understanding is reinforced by the legislative history; the statute's sponsor presented it as a benefit for aliens—not for U.S. citizens.

The limitation of eligibility to illegal aliens is manifest throughout the statute. Most notably, subsection (c)(2) operates in a sweeping manner to disqualify any U.S. citizen who might seek benefits under K.S.A. § 76-731a. Under subsection (c)(2), a person's residency (and eligibility for resident tuition) in another state renders him ineligible for the benefit of in-state tuition. Because the residency laws of the fifty states operate in complementary fashion so that every U.S. citizen is a resident of some state, every out-of-state U.S. citizen attending a public university in Kansas is disqualified. In contrast, an illegal alien cannot be disqualified by subsection (c)(2), because he cannot acquire legal residence in another state.

Read together, the requirements of subsections (b)(2), (c)(1), and (d) also reflect the exclusion of U.S. citizens. A qualifying "individual" either lacks a lawful immigration status, or possesses a legal, nonpermanent immigration status, other than a status

based on a valid student visa. Subsection (d) identifies additional requirements that "individuals" must also satisfy to receive the statute's benefits. The phrasing of subsection (d) cannot under any logical reading encompass U.S. citizens.

Recognizing their Equal Protection problem, Respondents in the District Court seized upon the fact that in 2004, Wichita State University erroneously granted five U.S. citizens in-state tuition benefits under K.S.A. § 76-731a. Respondents make a great deal of this error, in order to paper over the Equal Protection violation apparent on the face of the statute. The other universities in Kansas did not make this error; they read K.S.A. § 76-731a to categorically exclude all U.S. citizens. For example, Amicus Brigette Brennan was denied K.S.A. § 76-731a benefits by Kansas University officials simply because she was a U.S. citizen—despite the fact that while residing in Missouri, she attended and graduated from a Kansas high school. See WLF/Brennan Amicus Br. 2-3.

Later in their Brief, Respondents claim that even if K.S.A. 76-731a(c)(2) were found to discriminate against U.S. citizens, Petitioners cannot demonstrate redressability because they do not challenge other provisions of the statute that also prevent them from qualifying for its benefits. Resp. Br. 24, 32. That is incorrect. Petitioners have always challenged K.S.A. § 76-731a *in its entirety*, including the high school attendance requirement of subsection (b)(2). As explained above, the entire statute operates to exclude U.S. citizens, with numerous interdependent

provisions (especially (b)(2), (c)(1), (c)(2), and (d)) working together to do so.[6]

CONCLUSION

For the above-stated reasons, Petitioners respectfully request the issuance of a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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[6] It should also be noted that K.S.A. § 76-731a was enacted without a severability clause, reflecting the legislature's understanding that all of its provisions are interdependent and that no coherent severing is possible.